

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOACHIM PETROLINO,
Plaintiff,

v.

COUNTY OF SPOKANE, et al.,
Defendants.

No. CV-07-228-FVS

ORDER DENYING MOTION TO
DISMISS

COUNTY OF SPOKANE, et al.,
Defendants.

THIS MATTER comes before the Court without oral argument based on the defendants' motion to dismiss on the ground that the plaintiff's civil rights claims are untimely. The defendants are represented by Robert B. Binger. The plaintiff is represented by Gary Tenzel.

BACKGROUND

Joachim Petrolino seeks damages from Spokane County and others under 42 U.S.C. § 1983 based upon an injury he allegedly suffered on May 2, 2004. The statute of limitations is borrowed from state law; specifically, the forum state's limitation period for a personal injury claim. *Wilson v. Garcia*, 471 U.S. 261, 277-8, 105 S.Ct. 1938, 1947-8, 85 L.Ed.2d 254 (1984); *Sain v. City of Bend*, 309 F.3d 1134, 1138 (9th Cir.2002). In the State of Washington, the limitations period for a personal injury claim is three years. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir.2002) (citing RCW

1 4.16.080(2)). Thus, Mr. Petrolino had three years from May 2, 2004,
2 in which to commence his § 1983 action. On April 18, 2007, he served
3 a "Notice of Claim" upon representatives of Spokane County. RCW
4 4.96.020(4) ("No action shall be commenced against any local
5 governmental entity, or against any local governmental entity's
6 officers, employees, or volunteers, acting in such capacity, for
7 damages arising out of tortious conduct until sixty days have elapsed
8 after the claim has first been presented to and filed with the
9 governing body thereof."). He filed an action in state court on June
10 18, 2007. The defendants removed it to federal court. 28 U.S.C. §§
11 1441, 1446. They move to dismiss on the ground that Mr. Petrolino's §
12 1983 claim is time-barred. He disagrees. As he points out, RCW
13 4.96.020(4) contains a tolling clause. "The applicable period of
14 limitations within which an action must be commenced," says the
15 statute, "shall be tolled during the sixty-day period." If this
16 provision is borrowed from state law, then Mr. Petrolino's action is
17 timely. Otherwise, it is not.
18

19 **RULING**

20 A state-enacted notice-of-claim statute interferes with the
21 remedial purposes of § 1983. *Felder v. Casey*, 487 U.S. 131, 153, 108
22 S.Ct. 2302, 2314, 101 L.Ed.2d 123 (1988). As a result, Mr. Petrolino
23 did not have to comply with RCW 4.96.020(4) before bringing a § 1983
24 claim. *Id.* Nevertheless, he may be able to invoke its tolling
25 clause. *Harding v. Galceran*, 889 F.2d 906, 909 (9th Cir.1989), cert.
26 denied, 498 U.S. 1082, 111 S.Ct. 951, 112 L.Ed.2d 1040 (1991). In

1 *Harding*, the plaintiff had been charged with a misdemeanor in a
2 California court. *Id.* at 907. A state statute prohibited him from
3 bringing a civil action against the police officers, but tolled
4 California's one-year statute of limitations until the criminal charge
5 was resolved. *Id.* at 907-08. After he was acquitted, he filed a §
6 1983 action. The district court dismissed the claim because, by then,
7 over one year had elapsed since the claim had accrued. *Id.* at 907.
8 The Ninth Circuit reversed. Despite holding that federal law
9 preempted California's prohibition against filing § 1983 claim against
10 a police officer while a criminal charge was pending, *id.* at 908
11 (quoting *Felder*, 487 U.S. at 138, 153, 108 S.Ct. at 2307, 2314), the
12 Ninth Circuit held that the tolling provision applied because it was
13 consistent with the Constitution and § 1983. *Id.* at 909.

14 *Harding* figured prominently in *Silva v. Crain*, 169 F.3d 608 (9th
15 Cir.1999). There, the plaintiff filed a § 1983 action against a city,
16 its mayor, and a police officer after California's one-year statute of
17 limitations for personal injury claims had run. *Id.* at 609. The
18 district court granted the defendants' motion to dismiss. *Id.* at 610.
19 On appeal, the plaintiff pointed out that he was asserting a claim
20 against a public agency pursuant to the California Tort Claims Act
21 ("CTCA"). Under the CTCA, he was required to present notice of his
22 claim to the city before filing an action. That being the case, he
23 argued that his claim should be governed by the special statute of
24 limitations contained in the CTCA. *Id.* As authority, he cited
25 *Harding*. The Ninth Circuit was unpersuaded. Contrary to the statute
26

1 at issue in *Harding*, said the Ninth Circuit, the statute upon which
2 the plaintiff was relying does not contain a tolling provision:

3 [I]t is simply a separate freestanding special statute of
4 limitations which applies when claims are presented to
5 public agencies. Once a claim is presented, the section is
6 the only statute of limitations which applies to that claim.
7 It no more tolls the general residual tort statute of
8 limitations than do other wholly separate statutes of
limitations. It, like other statutes of limitations,
applies and controls cases in a particular area. It is not
a general statute of limitations at all.

9 *Id.* at 611. Given the Ninth Circuit's description of the statute upon
10 which the plaintiff was relying, it appears that RCW 4.96.020(4) is
11 substantially different. Unlike the California statute, RCW
12 4.96.020(4) contains a provision that explicitly tolls the limitations
13 period. *Id.* ("The applicable period of limitations within which an
14 action must be commenced shall be tolled during the sixty-day
15 period."). "In effect, RCW 4.96.020(4) provides a tort victim an
16 additional 60-day waiting period before the action must be brought."

17 *Pirtle v. Spokane Pub. Sch. Dist.*, 83 Wn. App. 304, 309, 921 P.2d 1084
18 (1996), review denied, 131 Wash.2d 1014, 932 P.2d 1257 (1997).
19 However, the fact that RCW 4.96.020(4) contains a tolling provision
20 does not mean that the tolling provision applies here. In order to
21 understand why, it is necessary to return to first principles.

22 As indicated above, the Supreme Court has decided to borrow the
23 statute of limitations for a § 1983 claim from state law. *Wilson*, 471
24 U.S. at 266, 105 S.Ct. at 1942. Nevertheless, there is a limit to the
25 Supreme Court's willingness to borrow. "Only the length of the
26

1 limitations period, and closely related questions of tolling and
 2 application are to be governed by state law." *Id.* at 269, 105 S.Ct.
 3 at 1943. This statement poses a significant question. Just what are
 4 "closely related questions of tolling?" In *Sain*, the Ninth Circuit
 5 considered this question; concluding that the phrase "is not to be
 6 given a broad reading[.]" 309 F.3d at 1138. In reaching that
 7 conclusion, the circuit court relied upon *West v. Conrail*, 481 U.S.
 8 35, 107 S.Ct. 1538, 95 L.Ed.2d 32 (1987). There, the Supreme Court
 9 said, "'[W]hen it is necessary for us to borrow a statute of
 10 limitations, we borrow no more than necessary.'" *Sain*, 309 F.3d at
 11 1138 (quoting *West*, 481 U.S. at 39-40, 107 S.Ct. at 1542).

12 While *Sain* provides useful background, it did not involve a
 13 tolling provision comparable to the one contained in RCW 4.96.020(4).¹
 14 *Harding* did. In that case, the Ninth Circuit said, "[A] state tolling
 15 provision must be applied when it is not inconsistent with the
 16 Constitution or other federal law." 889 F.2d at 909 (citing *Board of*
 17 *Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440
 18 (1980)).² The *Harding* court cited four reasons for applying the

21 ¹In *Sain*, the Ninth Circuit had to determine when a § 1983
 22 action commenced. Since the claim was federal in character, and
 23 since the plaintiff had filed it in federal court, the Ninth
 24 Circuit refused to borrow state law. Instead, the circuit court
 looked to the Federal Rules of Civil Procedure. 309 F.3d at
 1136-38.

25 ²*Harding* did not cite *West v. Conrail*, *supra*. While there
 26 may be some tension between the two cases, the Ninth Circuit has
 never qualified or overruled *Harding*.

1 California tolling provision in a § 1983 action. First, it relieved
2 litigants of the burden of defending against criminal charges and
3 prosecuting civil claims at the same time. 889 F.2d at 909. Second,
4 there was no inconsistency between the purpose of the tolling
5 provision and "the policies of deterrence and compensation embodied in
6 section 1983." *Id.* Third, borrowing the provision ensured
7 "consistent adjudication in state and federal courts." *Id.* Fourth,
8 borrowing the provision helped avoid unnecessary litigation. In that
9 regard, the Ninth Circuit said:

10 The tolling period serves the independent policy objective
11 of encouraging the criminal defendant to await the outcome
12 of the criminal action before instituting a section 1983
13 action. In some cases the delay may result in the avoidance
14 of unmeritorious actions that might otherwise be costly to
15 all concerned. At the same time, in other cases the delay
16 may help render unnecessary the filing of meritorious
17 actions, if the governmental entity is willing to settle the
18 claim after a full exploration of the facts has occurred in
19 a criminal proceeding.

20 *Id.*³

21 The first *Harding* factor has little or no relevance here. A
22 person who is preparing to file a § 1983 claim against a local
23 government or its employees does not face the type of conflicting
24 burdens present in *Harding*. By contrast, the second and third factors
25 are relevant here. As in *Harding*, borrowing the tolling provision
26 contained in RCW 4.96.020(4) would not offend the policies upon which
§ 1983 is based. Furthermore, it would ensure that a person who

27 ³There is no reason to think that the factors listed in
28 *Harding* are exclusive. Other factors also may be relevant.

1 intends to file a constitutional tort against a local government faces
2 the same limitations period that is faced by a person who intends to
3 file a personal injury claim. That leaves the fourth *Harding* factor,
4 which the Ninth Circuit characterized as the most important. 889 F.2d
5 at 909. As in *Harding*, borrowing the state tolling provision could
6 avoid unnecessary litigation by giving a local government time to
7 evaluate the plaintiff's claim. Indeed, this is one of the reasons
8 why RCW 4.96.020(4) was enacted. *Johnston v. City of Seattle*, 95 Wn.
9 App. 770, 774, 976 P.2d 1269, review denied, 139 Wash.2d 1010, 994
10 P.2d 844 (1999).

11 Having considered the factors listed in *Harding*, the Court
12 concludes that the tolling provision which is set forth in RCW
13 4.96.020(4) is not inconsistent with the Constitution or federal law.
14 Consequently, the tolling provision must be applied here. *Harding*,
15 889 F.2d at 909. Mr. Petrolino's § 1983 action is timely.

16 **IT IS HEREBY ORDERED:**

17 1. The defendants' motion to dismiss (**Ct. Rec. 7**) is **denied**.

18 2. The plaintiff's motion for attorneys' fees (**Ct. Rec. 13**) is

19 **denied**.

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order and furnish copies to counsel.

22 **DATED** this 11th day of December, 2007.

23
24 s/ Fred Van Sickle
25 Fred Van Sickle
26 United States District Judge